STATE OF CALIFORNIA GRAY DAVIS, GOVERNOR

DEPARTMENT OF INDUSTRIAL RELATIONS
OFFICE OF THE DIRECTOR
455 Golden Gate Avenue, Tenth Floor
San Francisco, CA 94102
(415) 703-5050

December 13, 1999

Mr. Dennis B. Cook
Cook, Brown & Prager, L.L.P.
555 Capitol Mall, Suite 114
Sacramento, CA 95814-4503

RE: Public Works Case #99-066
Oakley Union School District/RGW Construction, Inc.
Prevailing Wage Obligations Regarding Subcontracting
Truck Drivers Engaged in Hauling

Dear Mr. Cook:

This constitutes the determination of the Director of Industrial Relations regarding coverage of the above-referenced project under the California prevailing wage laws, and is made pursuant to Title 8, California Code of Regulations section 16001(a). Based upon my review of the documents submitted and analysis of the relevant facts as presented, I have determined that the truck drivers hired by general contractor RGW Construction, Inc. ("RGW") to haul fill material from a site specifically selected to provide material for a public works construction project must be paid prevailing wages because they are employed by a contractor in the execution of a public works contract and, therefore, are deemed to be employed upon a public work.

In this case, RGW has entered into an agreement with Sunrise Construction, Inc. ("Sunrise") to obtain fill material (dirt) from a parcel of land owned by a limited liability company for Oakley Middle School, a public works construction site. One of the principles in the L.L.C. is the owner of Sunrise. Sunrise will not engage in any construction work or hauling of material. The parcel is slated to be developed into a golf course. The owners of the parcel have supplied fertilized top soil on a few occasions in the past, and they may do so until the golf course is completed. RGW's own employees will load the dirt onto the trucks at the parcel. The truck drivers are employees of an independent subcontractor engaged by RGW to haul the dirt from the parcel to the Oakley Middle School site, which is approximately 12 miles away. According to your estimate, the truck drivers will spend about 90% of their work time driving between the two locations and about 15 minutes either picking up or dropping off the loads.

The specific question posed by your coverage request is whether the trucking subcontractor employees who haul the fill material between the two sites must be paid prevailing wages. As your letter acknowledges, the Department of Industrial Relations has long required the payment of prevailing wages to truckers engaged in this type of work. This is based on the decision in O.G. Sansone v. Department of Transportation (1976) 55 Cal.App.3d 434, 127 Cal.Rptr. 799, as well as on the Department's own interpretation of the Labor Code section 1772.

Labor Code section 1720(a) defines public works to mean: "Construction, alteration, demolition, or repair work done under contract and paid for in whole or in part out of public funds..." Labor Code section 1772 states: "Workers employed by contractors or subcontractors in the execution of any contract for public work are deemed to be employed upon public work."

It is your contention that, because the Department allegedly based its interpretation of prevailing wage requirements for off-site work on a related federal regulation (29 Code of Federal Regulations 5.2(j)) promulgated under the federal Davis-Bacon Act (40 U.S.C. 276(a) et seq.), the federal court's invalidation of that regulation in the case of Building and Construction Trades Department, AFL-CIO v. Midway Excavators, Inc. (D.C. Cir. 1991) should cause the Department to conform its interpretation of prevailing wage requirements for on-site hauling to the federal decision. For the following reasons, the Department rejects this proposition.

The operative language in the Davis-Bacon act construed by the federal court is:

> "[e]very contract in excess of $2,000 to which the United States . . . is a party, for construction, alteration, and/or repair, including painting and decorating, of public buildings or public works . . . and which requires or involves the employment of mechanics and/or laborers shall contain a stipulation that the contractor or his subcontractor shall pay all mechanics and laborers *employed directly upon the site of the work* (italics added). . . ." (40 U.S.C. 276(a).

29 Code of Federal Regulations 5.2(j) has long required that those hauling material to or from a federal public works site receive Davis-Bacon prevailing wages. In Midway, a federal Court of Appeal struck down this regulation on the basis that it went

beyond the language of the Act itself to extend coverage to truckers hauling to or from a federal public works site instead of only those employed directly upon the site of the work.[1] As noted above, the operative language in the California statute is "employed . . . *in the execution of any contract for public work* (italics added)." (Labor Code section 1772.)

Whether the Department based its interpretation of prevailing wage requirements for transportation of materials to a construction site on the federal regulation is irrelevant. The federal statute, by its own terms, requires the payment of prevailing wages only for work performed *directly* upon the site of the public work, while the California statute, on its face, has been construed to include off-site work and hauling in certain instances. In Sansone, supra, the Court of Appeal essentially found that subcontractors hauling material to a public works site were engaged in the execution of a contract for public work and were entitled to be paid prevailing wages.

An argument similar to yours was made law in Sharifi v. Young Bros., (1992) 835 S.W.2d 221, concerning the Texas prevailing wage law. In that case, the Texas Court of Appeal interpreted the applicable Texas statute, discussed below, to include workers employed by contractors to haul material to a Texas public works site. In discussing the difference between the federal Davis-Bacon Act and the Texas Davis-Bacon Act, the Texas Court stated:

> When a federal statute is adopted in a statute of this state, a presumption arises that the legislature knew and intended to adopt the construction placed on the federal statute by federal courts. This rule of construction is applicable, however, only if the state and federal acts are substantially similar and the state statute does not reflect a contrary legislative intent.
>
> After comparing the two statutes, we conclude that their coverage provisions are not substantially similar and that the legislature clearly intended to broaden the coverage of [the Act] when it selected the phrase "in the execution of any contract" rather than the phrase "employed directly upon the site of the work" found in the federal Act. The federal Act is by its

[1] This decision has been followed more recently in Ball, Ball, & Brosamer v. Reich, 24 F.3d 1447 (D.C. Cir. 1994), and L. P. Cavett Company v. United States Department of Labor, 101 F.3d 1111 (Sixth Cir. 1996).

> plain language more restrictive in its coverage than the Texas Act. Under the circumstances, we must determine and follow the intent of the legislature when it adopted a statute with obviously broader coverage. Thus, the federal cases cited by Young Brothers are not controlling in determining the coverage of the Texas Act. . . .
>
> We hold that a truck driver is entitled to the prevailing wage rate for time spent delivering materials to a highway construction site because he is employed "in the execution of [the] contract." (Internal citations omitted, Id. at page 223.)

Consistent with the rationale in Sharifi, California law extends a broader reach for coverage of off-site hauling than federal law. This is especially true when one considers that under California law prevailing wage statutes are to be liberally construed in favor of affected workers.[2]

For the foregoing reasons, I decline to apply recent federal case law that limits the scope of the Davis-Bacon Act to work performed "directly upon the site of the work," to work performed under the California prevailing wage law.

I hope this determination letter satisfactorily answers your inquiry.

Sincerely,

Stephen J. Smith
Director

cc: Daniel M. Curtin, Chief Deputy Director and Acting Chief, DLSR
Henry P. Nunn, III, Chief, DAS
Marcy Vacura Saunders, Labor Commissioner
Vanessa L. Holton, Assistant Chief Counsel

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[2] Walker v. County of Los Angeles (1961) 55 Cal.2d 626, 634-635, 12 Cal.Rptr. 671, 361 P.2d 247; Cassaretto v. San Francisco (1936) 18 Cal.App.2d 8, 10, 62 P.2d 777; McIntosh v. Aubry (1993) 14Cal.App.4th 1576, 1589, 18 Cal.Rptr.2d 680.